No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS TED CRUZ, STEVE DAINES, AND MIKE LEE SUPPORTING RESPONDENTS

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

QUESTION PRESENTED

Should this Court defer to the federal legislative branch in determining national policy for interstate internet sales taxes, or should it overturn *Quill* v. *North Dakota*, leaving it to states to legislate in this area and thereby disrupt the ongoing federal legislative process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Overturning *Quill* would thwart ongoing congressional efforts to find a workable solution to the remote sales tax issue 6

II. By adhering to *stare decisis* as endorsed in the *Quill* concurrence, this Court can allow Congress to replace that decision with a properly enacted federal solution. 12

III. In any event, *Quill* was correctly decided because the Constitution grants exclusive power to regulate interstate commerce to Congress 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Comptroller of the Treasury v. *Wynne*,
135 S. Ct. 1787 (2015) 14

H. P. Hood & Sons, Inc. v. *Du Mond*,
336 U.S. 525 (1949) 16

Kimble v. *Marvel Entertainment*,
135 S. Ct. 2401 (2015) 12, 13, 14

McCulloch v. *Maryland*,
17 U.S. 316 (1819) 15

Nat'l Bellas Hess v. *Dep't of Revenue*,
386 U.S. 753 (1967) 14, 16

Payne v. *Tennessee*,
501 U.S. 808 (1991) 12

Pearson v. *Callahan*,
555 U.S. 223 (2009) 12

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) ..... *passim*

S.C. State Highway Dep't. v. *Barnwell Bros., Inc.*,
303 U.S. 177 (1938) 16

Constitutional Provisions

U.S. Const. amend. X 16

U.S. Const. art. I. 8, 15

Bills and Statutes

Main Street Fairness Act,
S. 1452, 112th Cong. (2011-2012) 10

Marketplace and Internet Tax Fairness Act,
S. 2609, 113th Cong. (2013-2014) 10

Marketplace Fairness Act of 2017,
S. 976, 115th Cong. (2017-2018) 7, 10

No Regulation Without Representation Act,
H.R. 2887, 115th Cong. (2017-2018) 9

Remote Transactions Parity Act of 2017,
H.R. 2193, 115th Cong. (2017-2018) 7, 9

S.B. 106, 91st Sess. (S.D. 2016) 2

Sales Tax Fairness and Simplification Act,
S. 2152, 109th Cong. (2005-2006) 10

SDCL 10-64-1 2

SDCL 10-64-2 2

SDCL 10-64-3 3

Streamlined Sales and Use Tax,
S. 1736, 108th Cong. (2003-2004) 10

The Internet Tax Moratorium and Equity Act,
S. 512, 107th Cong. (2001-2002) 10

Other Authorities

Amazon Snips Prices on Other Sellers' Items Ahead of Holiday Onslaught, Wall Street Journal (Nov. 5, 2017), https://www.wsj.com/articles/amazon-snips-prices-on-other-sellers-items-ahead-of-holiday-onslaught-1509883201?mod= mktw. 11

Arthur Zaczkiewicz, Amazon, Wal-Mart Lead Top 25 Ecommerce Retail List, WWD (Mar. 7, 2016), http://wwd.com/businessnews/financial/amazon-walmart-top-ecommerce-retailers-10383750/ 8

Bryan Garner, et al., The Law of Judicial Precedent (2017) 12

Felix Frankfurter, The Commerce Clause under Marshall, Taney, and Waits (1937) 16

James Madison, Preface to the Debates in the Convention of 1787, *in* 3 The Records of the Federal Convention of 1787 (Max Farrand, ed. 1911) . 11, 15

Liran Einav et al., Sales Taxes and Internet Commerce, 104 Am. Econ. Rev. 1 (2014) 15

Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016), https://netchoice.org/ library/businesses-unite-behind-goodlatte-sales-tax-plan/. 8

Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf. 6, 8, 13

Tax Rates and Revenues, Sales and Use Taxes, DC Office of the Chief Financial Officer, https://cfo.dc.gov/page/tax-rates-and-revenues-sales-and-use-taxes..... 10

INTRODUCTION AND INTERESTS OF *AMICI*[1]

As the concurrence in *Quill Corp.* v. *North Dakota* noted, "Congress has the final say over regulation of interstate commerce, and it can change" the taxation rule challenged here "by simply saying so." 504 U.S. 298, 320 (1992) (Scalia, J., concurring in part and in the judgment). But, contrary to Petitioner, overturning *Quill* is not the next step in advancing this process. Rather, overturning *Quill* would upset ongoing negotiations in the Legislative Branch. If states could tax spending on interstate online purchases, they would immediately take advantage of this newfound power. This in turn would reduce incentives for a workable compromise and lead to states and cities engaging in the very sorts of protectionist activities the Commerce Clause sought to prevent.

Stare decisis, then, is at its zenith in this case. Not only would Respondents' reliance interests be compromised if *Quill* were overturned, but that would also seriously undermine the ability of *amici*—three United States Senators—to exercise their constitutional duties to regulate interstate commerce. While some *amici* support some legislative efforts, other *amici* support other approaches, and yet other *amici* support no federal legislation in this area whatsoever, the choice is for elected members of Congress to make.

---

[1] No one other than amici and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties filed blanket consents.

STATEMENT

It has been clear for many years that, to overturn *Quill*, Congress needed to act. All of the states knew this.

Rather than lobbying Congress, however, South Dakota in March 2016 enacted "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"). The Act requires any seller that "does not have a physical presence in the state" to collect and remit sales taxes if the seller satisfied either of two minimal conditions during the previous or current calendar year:

> (1) [its] gross revenue from the sales of tangible personal property, any products transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
>
> (2) [it] sold tangible personal property, any product transferred electronically or services for delivery into South Dakota in two hundred or more separate transactions.

S.B. 106, 91st Sess. (S.D. 2016) SDCL 10-64-2. However, in devising these standards, the legislature found that: (a) existing constitutional doctrine "prevents states from requiring remote sellers to collect sales tax;" and (b) "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* 10-64-1(7), (10).

Relying upon a right of action afforded only to the State itself, *id.* 10-64-3, the State filed suit in April 2016 against the respondents, retailers with no physical presence in South Dakota, and that the State conceded were acting lawfully in not collecting sales taxes. See *id.* 10-64-1(10); Complaint ¶ 24. The State sought a declaration that the Act is valid as applied to the respondents, although it acknowledged that the Act's collection requirements are currently unconstitutional. Complaint ¶¶ 1, 51.

For their part, each respondent has admitted that the respondent: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from the sales of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales taxes. See Addenda A & B.

When respondents moved for summary judgment, the State conceded that, because *Quill* is controlling, the lower court was required to grant summary judgment. In March 2017, the circuit court awarded judgment (Pet. App. B) and the State appealed. In its brief to the South Dakota Supreme Court, the State urged the Court to affirm summary judgment against the State, which it did in September 2017, on the basis of *Quill*. Pet. App. A.

SUMMARY OF ARGUMENT

I. Congress alone has the constitutional expertise and authority to address changes to the national economy of the last twenty-five years. During that period, Congress has undertaken substantial efforts to respond to these changes. Indeed, it is currently considering three bills that would respond to these changes.

By contrast, allowing States like South Dakota to tax sales from out-of-state vendors would hinder Congress' attempts to find a workable solution to the changing economy. Overturning *Quill* now would chill Congress' efforts to avoid the rival regulations that the Commerce Clause sought to prevent.

II. Principles of *stare decisis* weigh in favor of maintaining the "physical presence" requirement reaffirmed in *Quill*, which has been the law for over fifty years. When this Court decided *Quill*, it relied explicitly on Congress' silence on this question. It would thus be highly inappropriate for this Court to now take the same silence as a reason to overturn that long-settled precedent.

Reliance concerns also weigh in favor of a congressional solution to our changing economy. Under the *Quill* regime, businesses have developed in tax-advantaged states, thereby fostering growth and expansion not only in those states, but throughout the national economy.

III. In any event, *Quill* was a correct interpretation of the Commerce Clause. Drafted to prevent conflict

among the States, that Clause was a direct response to jealous and catastrophic regulations and taxes that created an internal trade war among the newly independent States. The States thus universally recognized that the power to regulate interstate commerce should necessarily belong to the federal government. To that end, in the Constitution, the Framers delegated that power to Congress, with almost no substantive debate.

South Dakota's statute mirrors the kinds of regulations to which the Framers were responding when they adopted the Commerce Clause. Because *Quill* recognized that reality, it was correctly decided, and therefore should be preserved for that reason as well.

ARGUMENT

I. Overturning *Quill* would thwart ongoing congressional efforts to find a workable solution to the remote sales tax issue.

Under the Commerce Clause, Congress not only has the constitutional authority over taxation of interstate sales using the internet, it has also undertaken substantial effort to find a workable solution to that issue. This is evident in the bills currently under consideration in Congress, additional attempts by the House Judiciary Committee to come up with a compromise, former bills that attempted to find a solution, and a variety of Congressional hearings regarding the issue.

1. For example, the House Judiciary Committee has written multiple versions of a bill that it hopes will serve as a "compromise solution."[2] After holding hearings and meeting with experts in 2014, the committee has come up with fresh ideas for addressing the issue. *Id.* By the end of 2017, its chairman, Representative Goodlatte, was optimistic that "the problem [was] becoming progressively less difficult to solve." *Id.*

Three bills currently pending before Congress demonstrate the variety of views on this topic. First,

---

[2] Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf.

the Senate is considering addressing this issue through the Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017-2018). That bill would allow the twenty-four states—including South Dakota—that have joined the Streamlined Sales and Use Tax Agreement (adopted in 2002) to mandate the collection of sales and use taxes when making a remote sale, provided the state meets certain simplification requirements. Remote sales would include any sales into a state in which a seller does not already have to pay sales and use taxes without the bill. There would be exceptions for small sellers, that is, those with gross U.S. remote sales below $1 million. To provide an adjustment period, states would not be allowed to enforce the law immediately.

The House has its own version of the bill, the Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018). The bill includes roughly the same scheme as the Marketplace Fairness Act. The most significant difference is that the exceptions are more detailed. A remote seller can be exempt from the mandate to collect sales and use taxes if the seller's gross annual receipts are less than $10 million in the first year, $5 million in the second year, or $1 million in the third year. Additionally, there is an exception for "utiliz[ing] an electronic marketplace for the purpose of making products or services available for sale to the public." *Id.*

Indeed, other bills have been proposed, and gone through repetitive drafts in efforts to find common

ground.[3] Over 100 online retailers wrote to Congress in support of one 2016 draft.[4]

The approach taken in the Committee's drafts has been to simplify compliance burdens by ensuring that, in collecting tax, remote sellers are responsible only to their home states and states within which they have a physical presence or have voluntarily registered as "dealers."[5] Remote sellers without a physical presence in the buyer's state, who have not voluntarily registered there, would collect the tax and remit it to the remote seller's home-state taxing authorities. Those authorities would then forward it to the customer's state using a proven clearinghouse method similar to that used for fuel taxes.[6]

It would be difficult to imagine this Court or a state legislature reaching the same sort of compromise. This Court, of course, lacks the power to enact an internet sales tax. See U.S. Const. art. I. And no state legislature has an incentive to compromise with citizens of other states; after all, they serve the interests

---

[3] See Goodlatte Statement at 1–3.

[4] Press Release, NetChoice, Businesses United Behind Goodlatte Sales Tax Plan (Sept. 1, 2016), https://netchoice.org/ library/businesses-unite-behind-goodlatte-sales-tax-plan/.

[5] See Arthur Zaczkiewicz, Amazon, Wal-Mart Lead Top 25 Ecommerce Retail List, WWD (Mar. 7, 2016), http://wwd.com/businessnews/financial/amazon-walmart-top-ecommerce-retailers-10383750/.

[6] Goodlatte Statement at 2.

of their constituents. Only Congress can work out a uniform compromise.

True, the House has not yet passed a version of the Remote Transactions Parity Act. However, this only demonstrates that the House has not come yet to an agreement, not that it is numb to the issue. The Constitution intentionally structured the legislative branch so that it would not move too quickly, and the House is merely meeting that expectation.

2. An alternative plan has been the No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018). This House bill would go in a different direction by prohibiting states from taxing a person's interstate retail activity if the person is not physically present in the state when the tax is enacted. However, a person is "physically present" for purposes of the bill if any of several conditions is met. For example, one is "physically present" if she maintains a domicile in the state; owns or maintains certain property in the state; has any employees in the state that perform certain tasks; or has three or more employees in a state.[7]

3. Congress has also made other attempts to address internet-sales taxes. A bill from the 107th Congress called for states and local governments to develop a uniform system for a sales-and-use tax on

---

[7] See No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018), https://www.congress.gov/bill/115th-congress/house-bill/ 2887.

remote sales. The Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001-2002). Additionally, several precursors to the Marketplace Fairness Act of 2017 have been introduced in prior Congresses. Those include the Streamlined Sales and Use Tax, S. 1736, 108th Cong. (2003-2004); the Sales Tax Fairness and Simplification Act, S. 2152, 109th Cong. (2005-2006); the Main Street Fairness Act, S. 1452, 112th Cong. (2011-2012); and the Marketplace and Internet Tax Fairness Act,S. 2609, 113th Cong. (2013-2014).

In short, this is not an issue that Congress is ignoring, just now considering, or considering half-heartedly. This is an issue that Congress has looked at consistently but on which it simply has not yet come to agreement.

4. Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause. At the same time, it would empower all fifty states to impose taxes on those who are least likely to resist. For example, the District of Columbia imposes a 14.8 percent tax on hotel guests—almost all of whom cannot vote for the D.C. City Council.[8] Likewise, states would feel free to

---

[8] Tax Rates and Revenues, Sales and Use Taxes, DC Office of the Chief Financial Officer, https://cfo.dc.gov/page/tax-rates-and-revenues-sales-and-use-taxes.

tax out-of-state businesses like Respondents who already face aggressive pricing driven by Amazon and Wal-Mart.[9]

If *Quill* were overturned, then, many of the key players in the current negotiations would focus on state rather than federal legislation to protect their interests. Whatever faction prevailed in the state legislatures would then have less incentive to continue working for a national solution. This patchwork of state laws would create—in the words of Madison—"rival, conflicting and angry regulations" and related market uncertainty. See James Madison, Preface to the Debates in the Convention of 1787, *in* 3 The Records of the Federal Convention of 1787, 547–58 (Max Farrand, ed. 1911). The burden of this uncertainty would fall on small retailers, unable to afford the army of lawyers that larger companies employ.

---

[9] See, *e.g.*, Amazon Snips Prices on Other Sellers' Items Ahead of Holiday Onslaught, Wall Street Journal (Nov. 5, 2017), https://www.wsj.com/articles/amazon-snips-prices-on-other-sellers-items-ahead-of-holiday-onslaught-1509883201?mod=mktw (noting aggressive price cuts). Both Amazon and Wal-Mart already voluntarily pay sales taxes for online sales, making *Quill's* impact limited.

II. By adhering to *stare decisis* as endorsed in the *Quill* concurrence, this Court can allow Congress to replace that decision with a properly enacted federal solution.

Principles of *stare decisis* weigh heavily in favor of leaving *Quill* in place. Indeed, in their concurrence in that case, Justices Scalia, Thomas, and Kennedy identified two factors that weighed heavily in favor of applying *stare decisis* there: First, the doctrine has "special force" where, as there, "Congress remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (internal punctuation and citations omitted); see also *Kimble* v. *Marvel Entertainment*, 135 S. Ct. 2401, 2409 (2015) (same). Second, "the demands of the doctrine are 'at their acme ... where reliance interests are involved'"—as everyone agreed they were there. *Quill*, 504 U.S. at 320 (Scalia, J., concurrence) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)); *accord id.* at 317 (majority's reliance on reliance interests). Indeed, this Court recently noted that reliance interests are relevant if there is "a reasonable possibility that parties have structured their business transactions in light of [Court precedent]." *Kimble*, 135 S. Ct. at 2410. The Court has also often noted that *stare decisis* is important when the decision has long been in place and where overruling the decision would lead to more "judge-made rule[s]." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009); see also Bryan Garner, et al., The Law of Judicial Precedent 370 (2017). All four of these factors are present here.

First, there is no doubt that Congress is free to overturn *Quill*. Not only did the *Quill* concurrence make this point, but the Solicitor General admits it on page 32 of his brief. Indeed, Congress in 2014 considered overturning *Quill* by statute. Goodlatte Statement at 1. But this bill was rejected for two reasons:

- Companies in one state could be taxed by another state. Much like the original American colonists, Respondents and other businessmen would be subjected to taxation without representation. *Id.*
- Companies would face extensive costs if they had to manage the taxes of 49 states and 6,000 municipalities. *Id.*

The fact that Congress has considered overturning *Quill* and rejected that path for policy reasons only reinforces the "special force" that must be given to *stare decisis*.

Second, contrary to Petitioner, reliance issues are still acutely present—and indeed stronger than the reliance interests relied on in *Kimble*. Knowing *Quill* is the law, Respondents and others have set up shop in one or two states, rather than fifty. This business model has fostered growth and expansion of the online internet business. Such growth would be at risk if corporations were suddenly required to follow new state laws and regulations that make it advantageous to have a physical presence in more states.

Third, the rule reaffirmed in *Quill* has been on the books for more than 50 years. See *Nat'l Bellas Hess* v. *Dep't of Revenue*, 386 U.S. 753 (1967). That is far longer than other cases in which this court has invoked the length of a precedent as a reason for reaffirming it.

Last, overturning *Quill* would likely lead to the creation of more judge-made law. If *Quill* were overturned, some states would likely tax internet sales more heavily than brick-and-mortar sales. This would surely lead to more cases about the scope of the dormant Commerce Clause doctrine. See, *e.g.*, *Comptroller of the Treasury* v. *Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting).

It is better to leave *Quill* on the books—whether or not it is overruled by Congress—than to open the door for a new line of cases in this constitutionally questionable area. Cf., e.g., *Kimble*, 135 S. Ct. at 2409 ("Respecting stare decisis means sticking to some wrong decisions"). Indeed, some of Petitioners' own *amici* already anticipate that, if *Quill* is abrogated, courts will have to draw new lines in this area. *E.g.* Amicus Brief of Four U.S. Senators at 12–19.

For all these reasons, settled principles of *stare decisis* demand that *Quill* be left on the books—and that Congress be allowed to play its proper role in regulating interstate commerce.

III. In any event, *Quill* was correctly decided because the Constitution grants exclusive power to regulate interstate commerce to Congress.

In any event, *Quill* was correctly decided because Congress alone has the constitutionally delegated power and institutional expertise to resolve the issue of whether an online merchant can be taxed by a state where the merchant has no physical presence. Because the "power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 17 U.S. 316, 431 (1819), allowing states to levy sales taxes on out-of-state retailers would naturally affect—and impede—interstate commerce.[10]

Yet Article I, section 8 of the Constitution explicitly delegates the power to "regulate Commerce ... among the several States" to Congress. This was not accidental. It was a deliberate response to a clear problem under the Articles of Confederation. Prior to this delegation to the federal government, States "taxed & irritated the adjoining States" in a manner that "proved abortive," and "engendered rival, conflicting and angry regulations." Madison, *supra*, at 547–48. As "commercial warfare between states began," it became

---

[10] Liran Einav et al., Sales Taxes and Internet Commerce, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states, and a 3-4 percent decrease in online purchasing from home-state sellers.").

abundantly clear that something needed to be done. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533 (1949). The clear need for action also had a clear solution—the power to regulate interstate commerce had to be given exclusively to the federal legislature. "No other federal power was so universally assumed to be necessary, [and] no other state power was so readily relinquished." *Id.* at 534.

Thus, as this Court recognized in *Bellas Hess*, "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760. The Tenth Amendment reserves to the states *only* those "powers not delegated to the United States by the Constitution[.]" U.S. Const. amend. X.

Accordingly, as this Court has long recognized, the Commerce Clause preempts state legislation that burdens interstate commerce even in the absence of congressional action. See *Quill*, 504 U.S. at 309 (The Commerce Clause "'by its own force' prohibits certain state actions that interfere with interstate commerce.") (quoting *S.C. State Highway Dep't.* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938)). Thus, even "without national legislation," the Commerce Clause "puts it into the power of the Court to place limits on state authority." Felix Frankfurter, The Commerce Clause under Marshall, Taney, and Waits 18 (1937).

Even absent congressional action, the Commerce Clause imposes those limits of its own force.

CONCLUSION

This is the prototypical case calling for application of *stare decisis*. *Amici* and other Senators and Representatives should be allowed to exercise the power the Constitution gives them to solve this important issue.

Respectfully Submitted,

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

April 2018